

No. 22312

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IN THE  
United States Court of Appeals  
FOR THE NINTH CIRCUIT

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EDWARD M. CLARIDGE AND KAY T. CLARIDGE,  
*his wife, et al.*

and

STATE OF ARIZONA, EX REL., OBED M. LASSEN  
*Appellants*

*v.*

THE UNITED STATES OF AMERICA  
*Appellee*

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Appeal From The United States District Court  
For The District Of Arizona

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Joint Brief For Appellants

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**Joint Brief For Appellants**

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**JURISDICTIONAL STATEMENT**

This is an interlocutory appeal from an order entered on November 4, 1966, by the United States District Court for the District of Arizona, Judge Walter E. Craig holding that the defendants and intervenors have no right, title, interest, claim or demand to the lands in question (R.107-116). The underlying action was brought by the United States to enjoin the defendants from interfering with the plaintiff and its contractor's use of an access road across land occupied

by the defendants, to quiet title in the United States to the lands in question, to eject the defendants from the subject land and for damages for past use and occupation of the lands involved. The District Court's jurisdiction was invoked under 28 U.S.C. 1345 (R. 1). The District Court's order of September 25, 1967, certified that it was of the opinion that the order involves questions of law as to which there are substantial grounds for differences of opinion and that an immediate appeal therefrom may materially advance the ultimate determination of this and other litigation (R.117-118). The defendants and intervenors on October 6, 1967, filed in this court a timely Application for Appeal under 28 U.S.C. 1292 (b), which was granted on October 31, 1967 (R. 129). This court's jurisdiction accordingly rests upon 28 U.S.C. 1292 (b).

### **STATEMENT OF CASE**

This is an action instituted by the United States to enjoin the defendants from interfering with the plaintiff's and its contractor's use of an access road across land occupied by the defendants, to quiet title in the United States to lands in question, to eject the defendants from the subject land and for damages for past use and occupation of the land by the defendants (R.1-8).

The lands involved in this action are located in the Palo Verde Valley, approximately one and one-half miles south of Ehrenberg, Arizona, on the Arizona side of the present Colorado River channel in Sections 22, 27, 28 and 33 in Township 3 North, Range 22 West, G&SRB&M (R.107). A portion of Lot 3 of Section 28



abuts the present flow channel of the river. The defendants, Edward M. Claridge, et al. have occupied the land for many years and carried on an agricultural operation on said land (R.61). This operation has included clearing and levelling of land, construction of roads and the erection of fences and other improvements upon the land. Prior to the defendants occupation of this land, it had been occupied and farmed by various other persons for several years. These defendants paid for the land and received a quit claim deed as evidence of right to the land.

The Colorado River valley in the area of the subject land is bounded on the east by a sharp rise in elevation located approximately on the north-south center line of Sections 22 and 27 of Township 3 North, Range 22 West, G&SRB&M, Arizona. This sharp rise forms the approximate eastern boundary of the subject land (Exhibit KK-2, Plate 1). The characteristics of the land and the vegetation thereon at the base of this sharp rise differ completely from the characteristics of the land and vegetation immediately on the top of this rise (R.61).

In the area bounded on the east by the sharp rise in elevation and on the west by the north-south center line of Range 22 East of SBM., California, during the period between 1874 (the date when the Palo Verde valley was first surveyed) and 1935 (the date the gates of Hoover Dam were closed), the Colorado River channel shifted many times by natural movements of the river and shifted at least once in the immediate vicinity of the subject lands by man-made rechannelization of the river (R.61).

In 1964 the Bureau of Reclamation entered upon the subject land to construct roads for the purpose of reaching authorized revetment and protective construction work on the Colorado River. In the course of this construction, the contractor cut fences and filled cattle guards located upon the land occupied by the defendants (R.61-62). This action was then instituted on March 27, 1964 (R.1-8).

Pursuant to stipulation, a temporary restraining order was entered on March 27, 1964, and a preliminary injunction was issued on April 10, 1964 (R. 18-19) enjoining the defendants from interfering with the use of the land by the plaintiff or its contractor in the construction work. On April 28, 1964, the State of Arizona filed a Motion to Intervene as a defendant (R.35-38) and in its proposed Intervenor's Answer alleged that the State of Arizona was the owner of the lands involved and prayed that title be adjudged in the State of Arizona (R.39-42). The State of Arizona was permitted to intervene in this action on March 1, 1965.

On April 8, 1966, the United States filed a Motion for Partial Summary Judgment based principally upon the contention that there was no genuine issue as to any material fact (R.88-91). After a hearing, Judge Craig denied plaintiff's Motion for Partial Summary Judgment.

Although, there were peripheral issues involving damages and estoppel presented to the lower court, the dispositive issues involved a determination of the location of the ordinary high water mark and the extent of the bed of the Colorado River. In a Joint Pre-Trial

Memorandum (R. 60-71) the parties to this action agreed, that:

- “1. For the purposes of this action and for this reach of the river only, the Colorado River is navigable.
2. When Arizona was admitted to statehood it acquired title to the lands underlying the navigable waters of the Colorado River between the east ordinary high water mark and the thread of the stream on the west. It is agreed that pursuant to the Submerged Lands Act, 43 U.S.C., 1301, et seq. 67 Stat. 29, Congress confirmed title to these lands to the State.”

In the Joint Pre-Trial Memorandum (R.66-71) and in a Pre-Trial Order (R. 77-79) issued subsequently by the court, the issues of law were set forth. The main issues were:

- “1. Where is the ordinary high water mark of a navigable river?
2. Whether the ordinary high water mark of a navigable river is altered where the flow of that river has been controlled by man-made structures.
3. Whether the common law doctrine of riparian rights, including accretion and reliction as it relates to change of ownership of real property, applies in Arizona.
4. If the answers to issues of law numbers 2 and 3 are in the affirmative, and assuming that structures on the river constructed by the United States resulted in the alteration of the flow of the river, to the extent that land within the high water mark of the river prior to the construction of said structures is exposed, except in times

of flood, can the plaintiff, United States of America, assert title to said land?

5. What is the effect, if any of the 1903 and 1920 withdrawal orders issued pursuant to authority given under the Act of June 17, 1902, 32 Stat. 338?"

In the Joint Pre-Trial Memorandum, issues of facts relating to the question of title to the subject lands were set forth. These issues were:

- "1. Where was the ordinary high water mark of the Colorado River on February 14, 1912 and in succeeding years?
2. If the waters of the present Colorado River do not reach the ordinary high water mark as it existed prior to control of the flow of the River in 1935, what are the causes of this change?
3. Are the lands involved in this litigation located between the center line of the Colorado River on the west and the ordinary high water mark of the River on the east?
4. Did the withdrawal orders of 1903 and 1929 relate to the lands involved in this litigation or to any lands lying between the ordinary high water mark on the east ordinary [sic] center line of the Colorado River on the west?"

At the trial appellee presented testimony seeking to show that the lands involved are now, and were always, a part of the public domain lying east of the ordinary high water mark and outside the bed of the Colorado River or in the alternative are lands which have been accreted or relicted to public domain lands lying to the east of the subject lands. The appellee's witnesses



took the position that the bed of the navigable Colorado River has always occupied a limited area similar to the area occupied by the present flow channel of the river. Through its witness John S. McEwan, the appellee presented a series of exhibits (T. 5-79 and Exhibit 7) showing how the location of this limited channel changed between the years 1879 and today.

On the other hand, the appellants asserted that the subject lands were a part of the bed of the river when Arizona was admitted to the Union on February 14, 1912, and that Arizona became the owner of the subject lands on that date. The appellants presented eye-witnesses who testified that prior to control of the river in 1935, the subject land supported the flow of the river during part of almost every year (T. 274, 279, 297, 305-307, 324, 325 and 331). The appellants presented several expert engineering witnesses who testified that their studies and observations made on the land showed the subject land had supported the flow of the river during a part of most years prior to 1935 (T. 393, 503 and 551). These studies are part of the record (Exhibits KK-1, KK-2, RR and QQ). The engineering studies and the testimony of the appellants witnesses relating to the flow of the river upon the subject land was supported by the testimony of appellees witnesses (T. 114-116, 124, 159-166, 251-258). All of the witnesses for both appellants and appellees agreed that the river flowed over the subject land during a part of most years previous to 1935.

The appellants contended that the lands are today free from inundation by the flow of the river primarily as a result of the abrupt changes caused by the con-

struction of Hoover Dam by the appellees and the subsequent closure of the gates of that dam in 1935, and that the present ordinary high water mark of the river exists by virtue of the controlled flow resulting from construction of Hoover Dam and other dams upstream from the lands in question. The District Court sustained this contention (R. 118). This dam was constructed for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River<sup>1</sup> and it has been completely effective in terminating the normal annual high flows of the river.

In the court below, the appellee argued that federal, not state law, determines the extent and nature of the United States title to accretion and reliction to federally-owned uplands. The appellants argued that as a fact accretion and reliction had not occurred in relation to the subject lands and that even if accretion and reliction had occurred, the state law rejected the doctrine of accretion and reliction. Since conclusion of this matter in the trial court, the Court of Appeals of Arizona, Division One, in the case of *State of Arizona v. Gunther & Shirley Company*, 5 Ariz. App. 77, 423 P. 2d 352 has held that the doctrine of accretion applies in Arizona notwithstanding the constitutional provision that the common law doctrine of riparian water rights shall not obtain or be of any force or effect in the state.

On November 4, 1966, Judge Craig entered his Findings of Fact, Conclusions of Law and Judgment, hold-

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<sup>1</sup> Boulder Canyon Project Act, 67 U. S. Stat. 29, 43 U.S.C. 617

ing that title to the lands in question is in the United States of America, free and clear of any right, title, interest, claim or demand of defendants or intervenors (R. 107-116).

This appeal followed (R. 130).

### **SPECIFICATIONS OF ERRORS RELIED ON**

1. The District Court erred in holding that the ordinary high water mark of a river is established by the ordinary flow of the river and does not extend to the peak flow or flood stage so as to include overflow on the flood plain.

2. The District Court erred in finding that it is immaterial to determine the location of the ordinary high water mark of the (Colorado) River in 1912 or subsequent dates.

3. The Court erred in holding that the ordinary high water mark of the Colorado River at the location in question is within the existing banks of the river to the west of the land in question and that the activities of the United States in constructing certain works within the river to confine and improve the channel had no effect upon location of the ordinary high water mark.

4. The District Court erred in holding that the lands in question were established by accretion or reliction and were accreted to or relicted to land owned by the United States.

5. The District Court erred in finding that no part of the lands in question lie within the bed of the Colo-

rado River from the thread of the river to its easterly bank, or otherwise.

6. The District Court erred in finding that the lands in question were withdrawn from entry by the withdrawal orders of January 13, 1903, and February 9, 1929, issued pursuant to Act of Congress dated June 17, 1902, 32 Stat. 388.

7. The District Court erred in holding that the title of the subject land is presently in the United States and that the defendants and intervenors have no right, title, interest, claim or demand to the lands in question.

8. The District Court erred in denying Defendants' motion to strike all testimony concerning the configuration of the river after 1935, the date of the closing of Hoover Dam (T. 170, Line 13, through 171, Line 6).

9. The District Court erred in denying Defendants' motion to strike testimony relative to the position of the channel of the river and all other facts concerning the movement of the channel of the river after 1935 (T. 229, Line 22, through 230, Line 6).

#### **QUESTIONS PRESENTED**

1. Whether the ordinary high water mark and bed of a navigable river is established by and includes all of the area below the line created by the water during the usual high flow stage of the river's annual cycle.

2. Whether the ordinary high water mark of the river as it existed in 1912 or at subsequent dates is material in determining title to the subject lands.



3. Whether changes in the flow pattern of the Colorado River caused by action of the United States by construction of Hoover Dam changed or altered the then existing ordinary high water mark for purposes of changing ownership to the lands affected.

4. Whether the man-made changes in the flow pattern of the Colorado River caused by construction of Hoover Dam resulted in accretion, reliction or avulsion in the area of subject lands.

5. Whether the man-made changes of the flow pattern of the Colorado River in the area of subject lands resulted from the construction of Hoover Dam were within and a part of the specific purposes of the Boulder Canyon Act, to wit, "... controlling the floods, improving navigation and regulating the flow of the Colorado River ..."

6. Whether the United States, after installing structures designed to control the floods and regulate the flow of the Colorado River, is estopped to claim that it now takes title to all of the lands resulting from that control and regulation.

7. Whether withdrawal orders of 1903 and 1929 issued pursuant to authority given under the Act of June 17, 1902, 32 Stat. 338, have any effect upon land within the bed of the navigable Colorado River owned by the State of Arizona.

### SUMMARY OF ARGUMENT

The court below found that title to the land in question is in the appellee, the United States, free and clear of any right, title, interest, claim or demand of defend-

ants or intervenors. The reasoning of the court below is synthesized in its Finding of Fact that "it is immaterial to determine the location of the ordinary high water mark of the river in 1912 or subsequent dates, other than the date at which defendants claim title or right to possession," and its Conclusion of Law that "the ordinary high water mark of the Colorado River at the location in question is within the existing banks of the river to the west of the lands in question, regardless of the activity by the United States in constructing certain works within the river. . . ." (R. 113-114).

In each of these findings, the court was in error.

The Colorado River is a navigable stream in the reach of the river involved in this action.<sup>2</sup> It is a well established principle of law, that upon admission into the union, a state acquires title to the beds of navigable rivers between the ordinary high water mark, or where a river forms a boundary between two states, between the ordinary high water mark on the side of the state and the center of the river.<sup>3</sup> Congress by the Submerged Lands Act of 1953<sup>4</sup> confirmed and recognized the respective states' title to lands beneath navigable waters lying within a state. Unquestionably at statehood Arizona became the owner of the bed of the navigable stream insofar as that bed lay within the boundary of the State.

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<sup>2</sup> *Arizona v. California*, 283 U.S. 243, 51 S. Ct. 522.

<sup>3</sup> *Pollard v. Hagan*, 44 U. S. (3 How) 212; *Shiveley v. Bowlby*, 152 U. S. 1, 43, 14 S. Ct. 548; *Martin, et al v. Waddell*, 41 U. S. (16 Pet.) 410; *Hardin v. Jordan*, 140 U. S. 371 (11 S. Ct. 808); *Tyson v. State of Iowa*, 283 F. 2d 802 (C.A. 8).

<sup>4</sup> Submerged Lands Act, *supra*.

Establishment of the location of the ordinary high water mark of a navigable river and the area encompassed by the bed of that river has been the subject of numerous cases including several cases decided by the United States Supreme Court.<sup>5</sup> Although the language of these cases does not establish an exact rule for every fact situation, these cases generally hold that *the ordinary high water mark of a navigable river is established at the line created by the water during the normal annual high flow stage of the river's annual cycle*. The evidence presented below, including eyewitnesses to the flow, the vegetation pattern, the soil condition, exhibits and the testimony of expert witnesses established the location of that line. The subject land was within the ordinary high water mark when Arizona entered the Union and Arizona took title to the subject land at that time. In order for the appellee to prevail, it must establish some legal basis upon which title was returned to it after 1912.

The parties to this action admitted in their Joint Pre-Trial Memorandum that changes in the flow of the river in the area of the subject land were caused by construction of Hoover Dam and the resulting control of the flow of the river (R. 65). Congress authorized the construction of works on the Colorado River for the specific purpose of *controlling floods, improving navigation and regulating the flow of the Colorado River*.<sup>6</sup> This control of the river has greatly altered the natural ordinary high water mark of the river. The flow was altered abruptly and finally when the gates

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<sup>5</sup> *Howard v. Ingersoll*, 54 U.S. (13 How.) 380; *Alabama v. Georgia*, 64 U.S. (23 How.) 505; *Oklahoma v. Texas*, 260 U. S. 606.

<sup>6</sup> Boulder Canyon Project, Oct. *supra*.

of Hoover Dam were closed. The resulting changes were sudden and obvious (not gradual and imperceptible) and therefore not accretive or relictive.<sup>7</sup>

The general law provides that lands formed by artificial reliction or accretion can be claimed by a riparian owner<sup>8</sup> unless the artificial conditions causing the accretion or reliction were created by the claimant for that specific purpose.<sup>9</sup> The United States did not gain title to the subject land by reliction or accretion resulting from acts of its agents which terminated the flow of the river over these lands and caused the lands to appear as relicted or accreted to the uplands owned by the United States.

## ARGUMENT

### I

## INTRODUCTION

The decision of the court below that the lands in question belong to the United States rests on three fallacies. To say that location of the ordinary high water mark of the river at statehood, the date Arizona took title to the bed of a navigable stream, is immaterial, is to disregard in toto the rights granted to the state

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<sup>7</sup> *Philadelphia Co., v. Stimson*, 223 U. S. 605, 624 (32 S. Ct. 340, 346)

<sup>8</sup> *County of St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46, 50-66 and *Beaver v. United States*, 350 F. 2d 4 (C.A. 9).

<sup>9</sup> *Thompson on Real Property*, Sec. 2560, Vol. 5A, p. 604; 56 *Am. Jur.*, Waters Sec. 486, pp. 899-900; 65 *C.J.S.*, Navigable Waters, Sec. 82(2), p. 257; 134 *A.L.R.*, 467, 472 and 91 *A.L.R.* 2d 857. This court in *Beaver v. U.S.*, *supra*, limited this rule by stating that a riparian owner could claim lands formed by accretion or reliction "unless, perhaps, structures are erected for the specific purpose of causing the accretion."

under the “equal footing doctrine.”<sup>10</sup> To say that the ordinary high water mark of a river is established by the present flow channel of that river when that flow channel was artificially created is once again to deprive the State of Arizona of its rights under the “equal footing doctrine.” Finally to ignore the activities of the United States in altering the flow of the river to deprive Arizona of its title to land within the river bed is to condone tactics which justice should not allow. These fallacies are not consistent with the law.

## II

**THE LOCATION OF THE ORDINARY HIGHER WATER MARK AND BED OF THE COLORADO RIVER IN 1912 IS MATERIAL BECAUSE IT DETERMINES THE AREA OF LAND WHICH ARIZONA TOOK TITLE TO WHEN IT ENTERED THE UNION.**

The court below found as a fact, that “it is immaterial to determine the location of the ordinary high water mark of the river in 1912 or subsequent dates, other than the date at which the defendants claim title or right to possession.” In 1912 when Arizona was admitted to the Union, it took title to the beds of navigable streams lying within the boundaries of the State. Any discussion of the state’s rights to any of these lands today must of necessity begin with the area encompassed within the state’s boundaries in 1912. We submit that this finding of the court needs no legal citation to illustrate its incorrectness. In order to determine present ownership of the subject lands, the

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<sup>10</sup> 37 U.S. Stat. 39, 1728; *Shiveley v. Bowlby*, *supra*.



court must look first to the conditions as they existed in 1912 and then to changes and the causes of any changes of title which have occurred since that date.

### III

THE BED OF THE COLORADO RIVER IN ITS NATURAL STATE INCLUDED ALL OF THE AREA BELOW THE ORDINARY HIGH WATER MARK WHICH IS THE LINE CREATED BY THE WATER DURING THE ANNUAL HIGH FLOW STAGE OF THE RIVER'S ANNUAL CYCLE.

The parties to this appeal are in agreement, that the State of Arizona owns the bed of the river and that this bed is the area located below the ordinary high water mark of the river. Any doubt about the state's right to lands within the bed of the river was settled when the United States, pursuant to the Submerged Lands Act<sup>11</sup> quit claimed to the state all lands underlying navigable waters up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion and reliction.

The paramount issue in this case, is therefore the location of the ordinary high water mark. At first glance, it might appear that this issue could be settled simply by observing the facts of where the river now flows. In a normal action, this might be so. However, in the instant case, we are dealing with a river which has been completely controlled since 1935 (T. 24-25, 363) and the natural flow and marks created by the natural flow are not today as readily observable as would be desired. However, Exhibits 4, 22-A, 22-B,

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<sup>11</sup> Submerged Lands Act, *supra*.

22-C, being 1930 aerial photographs of the subject property give the court an actual view of the condition of the subject land just four years prior to the complete control of the river.

The evidence presented in the court below established that in most years prior to 1935, the river flowed over and upon all of the subject land for a period of from a few days to several weeks during most years. (R. 88, 112, 156-159, 251-258, 274, 279, 305-307, 324-325, 331). The natural river had two distinct stages, i.e., the volume of flow in the river was normally at a low stage between late July and April, and at a much higher stage from early May to mid-July following a definite and predictable pattern (T. 368-370). This ordinary flow established the ordinary high water mark of the river.

In *Howard v. Ingersoll*, supra, the United States Supreme Court, faced with a problem of defining the bed of the Chattahooche River, for purposes of establishing the boundary line between the State of Georgia and federal territory, established a definition of the bed of the river. This definition has since been followed in substantially all cases which have attempted to define the ordinary high water mark and the bed of a navigable river.

The court stated:

“ . . . When banks of rivers were spoken of those boundaries were meant to contain their waters at the *highest flow*, and in that condition they make what is called the *bed of the river* . . . (Emphasis added.) p. 415.

“The call is for the bank, the fast land which confines the water of the river in its channel or bed in its whole width . . . The bank or slope from the bluff or perpendicular of the bank *may not be reached by the water for two-thirds of the year, still the water line impressed on the slope is the line required by the commissioner, and the shore of the river though left dry for any time, and but occasionally covered by water in any stage of it to the bank, was retained by Georgia as the river up to that line . . .* Both bank and bed are to be ascertained by inspection *and the line is where the action of the water has permanently marked itself upon the soil. . . .*” (Emphasis added.) p. 417

A few years after the decision in *Howard*, a similar question came before the Supreme Court. In *Alabama v. Georgia*, *supra*, the court reiterated the basic concept as to the location of the bed of a river and stated:

“ . . . [T]he bed of the river is that portion of soil *which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extra ordinary freshets of winter or spring, or the extreme drought of the summer or autumn. . . .*” p. 515.

The evidence presented in the court below established that the flow of the river in its natural condition is subject to extreme variations. An expert witness for the appellant testified that the normal high flows — as distinguished from the unpredictable freshets or floods — (T. 243, 244, 497) of the river are 100-200 times greater than the normal low flows (T. 414). Because of this great variation, the flow of the river in its nat-



ural condition alternately covered and left bare large areas of land within the bed of the river. The land left bare during the low flow period is no less a part of the bed of the river than the area permanently covered by the flow.<sup>12</sup>

Approximately 30 years have passed since the flow of the river in the area of the subject land was controlled. This control has resulted in many of the physical features, which would aid in establishing with exactness the ordinary high water mark of the river, becoming more difficult to observe. In the absence of a clear natural line impressed on the bank, some courts have turned to a discussion of the character of vegetation and whether the land was usable for agricultural purposes as an aid to determine the location of the line describing the bed and the ordinary high water mark of a river. There is however, conflict on the issue of vegetation within the bed of a navigable stream.<sup>13</sup> The better rule concerning vegetation as a guide to determine the extent of the bed of a river established in *Howard* has been followed by many decisions.<sup>14</sup>

<sup>12</sup> *Churchill v. Kingsbury*, 174 P. 329, 178 Cal. 554.

<sup>13</sup> *United States v. Chicago B. & O. Ry. Co.*, 90 Fed 2d, 161, 170 where the court took the extreme view that the bed is the area where all vegetation has been destroyed and *Howard vs. Ingersol*, supra, where the Supreme Court took the view that the character of the vegetation, rather than the absence of vegetation determined the area within the bed of a river.

<sup>14</sup> *State of Iowa v. Thomas*, 155 N.W. 859, 173 Iowa 408; *Johnson v. City of Charleston*, 112 S.E. 577, 91 W.Va. 318; *Driesbach v. Lynch*, 243 P. 2d 446; *Raide v. Dollar*, 203 P. 469, 34 Idaho 682; *City of Tulsa v. Peacock*, 74 P. 2d 359, 181 Okl. 383; *State ex rel. v. Sorenson et al.*, 222 Iowa 1248, 271 N.W. 234; *State v. Longfellow*, 169 Mo. 109, 69 S.W. 374; *State ex rel Thompson v. Parker*, 132 Ark. 316, 200 S. W. 1014; *Anderson v. Reames*, 204 Ark. 216, 161 S.W. 2d 957; *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816, Ann. Cas. 1915 C, 1148; *Union Sand & Gravel Co. v. Northcott*, 102 W. Va. 519, 135 S.E. 589; *Tilden v. Smith*, 94 Fla. 502, 113 So. 708; *Carpenter v. Board of Commissioners*, 56 Minn. 513, 58 N.W. 295, 45 Am. St. Rep. 494; *Sun Dial Ranch Co. v. May Land Co.*, 61 Or. 205, 119 P. 758, 759; *Austin v. City of Bellingham*, 69 Wash. 677, 126 P. 59; *Willis v. United States*, 50 F., Supp. 99.

The purpose of using the character of vegetation is to help provide an easier means of locating the ordinary high water mark where there are not other adequate marks on the surface of the ground, and this purpose is served so long as there is a sufficient change in the character of the vegetation to permit determining the location of the bed of a river. We submit that the rule adopted in *Howard* and the cases following *Howard*, emphasizes the *change in vegetation or in the character of vegetation, rather than demanding a complete absence of vegetation within the bed, of a river is the proper reasoning*. Such reasoning is particularly true in an area like the southwest where vegetation springs up rapidly when adequate water is present in the soil.

Some courts have ruled that the gist of the ordinary high water mark is whether or not the river flowed over the land in a manner which prevented its use for agricultural purposes. Evidence presented in the court below clearly established that the subject land could not be and was not used for agricultural purposes until after the river was controlled in 1935 (T. 278, 304 & Exhibits 4, 22-A, 22-B and 22-C).

The Supreme Court in *Howard*, and other courts in many cases, make it very clear that the vegetation test for a navigable stream's ordinary high water mark means not that within such line vegetation has been destroyed by the water covering the soil but that the soil is or has been covered by water for a sufficient time to destroy its value for agricultural purposes.<sup>15</sup> Witnesses

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<sup>15</sup> Ibid

in the trial below testified that the subject land was not usable for agricultural purposes until after the river was controlled in 1935 (T. 298, T. 304).<sup>16</sup>

In the recent case of *Borough of Ford v. United States*, 345 F. 2d 645 (C.A. 3, 1965), the third circuit, following the *Howard* and other well considered opinions stated:

“... [W]e are satisfied that the sound law as to what constitutes the river bed of a navigable stream is . . . the land upon which the waters have visibly asserted their dominion, the value of which for agricultural purposes has been destroyed. The value for agricultural purposes is destroyed where terrestrial plants not all plant life ceases to grow. . . .”

We think that in view of the climatic conditions in the area of the subject land favoring rapid plant growth and the characteristics of the Colorado River to fluctuate greatly from season to season, this court must conclude that the subject lands are part of the bed of the river.

In establishing its meander line for the Arizona Statehood Survey of 1917, the Bureau of Land Management survey team determined the location of the ordinary high water mark in the area of subject land (Exhibit 7, Page 5). This ordinary high water mark established by observations made on the land by agents of the plaintiff (T. 110, 182, 194, 221-223) follows close along the foot of the bluff just to the east of sub-

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<sup>16</sup> Although livestock did graze on the subject land (T. 322) during the low flow period of the years there is absolutely no evidence that the land was ever used for agricultural purposes as that term is normally used.

ject land. This line along the foot of the bluff substantially agrees with the testimony of the witnesses who indicated that during normal high flow periods the water flowed across the subject land and against the bluff (T. 251-252, 297, 306). These exhibits and the testimony indicates that substantially all of subject land was below the ordinary high water mark except a small part in the northeast corner. There is no evidence to indicate a change in the ordinary high water mark established by this 1917 survey until Hoover Dam effectively controlled the Colorado River and altered the annual flow pattern of the river.

Expert witnesses for the appellee made extensive studies to locate the ordinary high water mark of the river. The results of these studies were presented to the court below through testimony and through Exhibits KK-1, KK-2 and QQ. In preparation of these exhibits, these experts spent considerable time on the subject lands and made observations relating to character of the soil and the vegetative differences on the subject land and the land immediately to the east (T. 405, 496, 507, 520) which confirmed the engineering studies as to the location of the ordinary high water mark and the bed of the river.

We submit that all of the evidence presented to the court below when measured by the cases heretofore cited, establishes that the subject land is land which was naturally within the bed of the river prior to 1935. The evidence shows: (1) That the flow of the Colorado River in times past was against the face of the bluff to the east of the subject land. (2) That the vegetative differences in the area of the subject land



and the land on the bluff to the east varies greatly and that the vegetation on the subject lands is of a type that grows and flourishes best where an abundance of water is always present. (3) That eye-witnesses observed the flow of the river over the subject lands for a considerable period of time during most years prior to 1935. (4) That surveys performed by agents of the United States established the ordinary high water mark in 1917 at a point to the east of the subject lands, even though at that time the main channel of the river according to appellees witnesses was not to the east of the subject land. (5) That the result of engineering work done by expert witnesses affirms all of the physical observations relating to the location of the ordinary high water mark observable in the past or today upon the subject land. (Exhibits L, M, N, O & P).

It is therefore submitted that the ordinary high water mark on the east bank of the river in the area of the subject land was the bluff line prior to 1935 and that this line has changed since that date only as a result of artificial control imposed by the appellee and its agents. The main flow channel has shifted within the bed of the river but the bed and the ordinary high water mark have remained substantially stationary and there was no movement of the bed of the river to which the rules of accretion and reliction can apply to divest the State of Arizona of title to the subject land.

We submit that the appellee bears the burden to establish that the subject land were and are outside the bed of the river. The only attempt by the appellees to establish an ordinary high water mark was that line shown at Page 5 of Exhibit 7, being the meander line

established by the Bureau of Reclamation in its 1917 survey on the subject land. This line established the ordinary high water mark to the east of the subject land.

Two other specifications of error required but limited mention in this section of the brief—the admission by the court below of evidence relating to movements of the river subsequent to 1935, and the effect of the 1903 and 1929 withdrawal orders.

We think these questions are answered by appellants discussion of the law concerning the location of the bed and the ordinary high water mark of the river. If appellants legal position is correct, by express language in the withdrawal orders (Exhibit 31 & 32), the subject lands were not affected by the withdrawal orders and testimony relating to movements of the river after 1935 is irrelevant, since these movements did not alter the location of the bed of the river and had no legal effect on the title of the State of Arizona to the subject lands.

#### IV

#### THE CLAIM OF THE APPELLEE THAT IT HAS GAINED TITLE TO THE SUBJECT LAND BY ACCRETION OR RELICTION IS NOT VALID.

Appellee contends that title to the subject land, if it was ever owned by Arizona, has been returned to the United States by the process of accretion or reliction. To support this claim, extensive evidence was offered at the trial concerning the movements of the *main flow channel* between 1874 and the present, (Exhibit 7 and

T. 28-39). There was testimony below that much of the movement, even of this main flow channel, was in fact, sudden and dramatic and was therefor avulsive, rather than accretive (T. 30-31, 34, 35, 48, 54).

**A — CHANGES BETWEEN 1912 AND 1935 DID NOT ALTER THE BED OR ORDINARY HIGH WATER MARK OF THE RIVER.**

Appellees basic contention regarding the river movements are invalid because the terms accretion and eliction refer to changes which occur only on the banks of bodies of waters, changing the location of the ordinary high water mark. In this case, the movements of the main channel throughout the period from 1912 to 1935 described by plaintiff's testimony in connection with Exhibit 7 have been entirely within the bed of the river. Testimony established that the bed of the river throughout these years remained constant, bounded by the bluffs on the Arizona side and the high ground of the levee on the California side (T. 252, 297, 306 and 455). The main flow channel moved from time to time, but the ordinary high mark remained substantially the same until 1935, when Hoover Dam brought about its sudden and dramatic impact. Since the ordinary high water mark remained unchanged until 1935, no accretion or reliction occurred before that date.

**B — CHANGES AFTER 1935 WERE NOT ACCRETIVE OR RELICTIVE.**

It is obvious that nothing could be more sudden than the closing of the gates of Hoover Dam in 1935, and the resulting change in the character of the river from a

basically uncontrolled river to a "conveyance channel" as it now is (T. 363).

Accretion is an addition to riparian land gradually and imperceptibly made by the water to which the land is contiguous and reliction is a term applied to land which is created by the gradual and permanent withdrawal of the water by which it was covered.<sup>17</sup> Where the boundary of a tract of land is gradually and imperceptibly changed by accretion and reliction, this riparian owner gains title to the new lands formed. However, no change of title results when the location of a river changes abruptly, rather than gradually and imperceptibly.<sup>18</sup>

**C — A RIPARIAN OWNER CREATING CHANGES IN THE BED OF A RIVER CANNOT CLAIM LANDS FORMED AS A RESULT OF THE CHANGES.**

In the recent case of *Beaver v. United States*, supra, this court considered the question of whether the United States could claim a tract of land purportedly formed by accretion, where it had induced the accretion process. Although, the court in *Beaver* found that the actions of the United States were an insignificant factor in inducing accretions, the court citing *County of St. Clair v. Lovington*, supra, stated the general rule that the erecting of artificial structures does not alter the application of the accretion doctrine, "unless, perhaps, structures are erected for the specific purpose

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<sup>17</sup> 65 C.J.S., Navigable Waters, Sec. 81; 56 Am. Jur., Waters, Sec. 476.

<sup>18</sup> 56 Am. Jur., Waters, Sec. 477; 65 C.J.S., Navigable Waters, Sec. 82 (1); *Philadelphia Co., v. Stimson*, supra.



of causing the accretion.” By this statement the court apparently recognized the general rule that the rights of accretion and reliction do not extend to an upland owner where he has caused the accretion or reliction by artificial means.<sup>19</sup>

The Boulder Canyon Act, *supra* was enacted by Congress for the purpose of “controlling floods, improving navigation and regulating the flow of the Colorado River.” Pursuant to this act, Hoover Dam was constructed upstream from the area involved in this litigation, and the gates of Hoover Dam were closed in 1935. After closure of the gates of Hoover Dam, the river became a completely controlled river. It is today a “conveyance channel” responding to direct demands for irrigation and power (T. 363). The river has been subjected to channelization work by the appellee, the purpose of which, is to *compress the river into a definite channel of a reduced width* (T. 24-25). Although, not set forth in so many words, the purpose of the Act was to prevent the annual high flow of the river which had prior to the construction of the dam, flowed upon large areas of land during its normal annual high flow cycle (T. 363-365 and Exhibit FF).

It is elementary that a party is presumed to know the natural consequences of his deliberate acts and is charged with such knowledge. What result could be more foreseeable, from the standpoint of the appellee and its agents, than that large areas of land formerly within the bed of the river would be removed from the

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<sup>19</sup> 65 C.J.S., *Navigable Waters*, Sec. 82 (2); 56 Am. Jur., *Waters*, Sec. 486. See also the cases discussed in 134 A.L.R. 467, 472; 91 A.L.R. 2d 857, 881; *Thompson on Real Property*, Vol. 5A, Sec. 2560; 37 Notre Dame Law 437.

bed and "protected" from the annual high flows formerly existing on the river (Exhibit FF). The controlled plan consisting of the construction of Hoover Dam and the subsequent rechannelization has been highly successful, and the high flow cycle of the river no longer occurs. The projected result has become the controlling fact. We submit that the United States is estopped from claiming title to the land it has "protected" by these projects. To hold otherwise would be a travesty on equity and an injustice.

One last case on this subject bears mentioning. In *Sea Coast Real Estate, v. American Timber Co.*, 113 A. 49, 92 N.J. Eq. 219, the New Jersey court indicated that accretion must in fact be by natural forces or by lawful acts resulting in an imperceptible change. The court concluded that if this were not the case, "*otherwise there would be no limit (in creation of accretion lands) but the length of the riparian owner's purse.*" This is particularly true in the case of the appellee as against the State of Arizona or private parties. If the appellee can create structures which cause reliction or accretion and gain title to the lands formed thereby, it, with its vast resources, can divest title to vast areas of land along navigable rivers.

We submit that accretion or reliction has not occurred with reference to the subject land, and that title to the lands remains in the State of Arizona.

## CONCLUSION

For the reasons stated it is respectfully submitted that the district court's order adjudging and decreeing title to the land in question to be in the United States be reversed and the cause remanded with instructions to enter an order decreeing title to the land in question is in the State of Arizona.

Respectfully submitted,

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MAY, 1968

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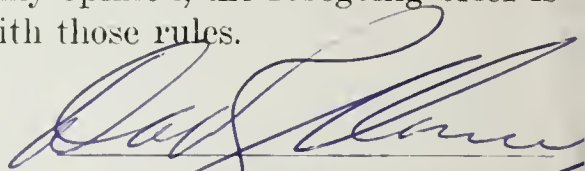
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## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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DALE R. SHUMWAY, Attorney